IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC.
DISSTON DIVISION-DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The original decision and order of the National Labor Relations Board issued July 9, 1965 are reported at 153 NLRB 1370 (1965) (A. 43-56).* The opinion by the United States Court of Appeals for the District of Columbia Circuit which accompanied its order of May 19, 1966 enforcing the Board's original decision and order is reported at 363 F.2d 272 (D.C. Cir.), *cert. denied*, 385 U.S. 851 (1966) (A. 57). The clarifying opin-

*The abbreviation "A." refers to the single appendix to the briefs of the parties.

ion by the Court of Appeals which accompanied its order of December 8, 1967 remanding this case to the Board is reported at 389 F.2d 295 (D.C. Cir. 1967) (A. 114). The supplemental decision and order of the Board issued July 3, 1968 on remand, are reported at 172 NLRB No. 72 (1968) (A. 132). The *per curiam* order dated April 22, 1969 by which the Court of Appeals enforced the supplemental decision and order of the Board is reported at 414 F.2d 1123 (D.C. Cir. 1969) (A. 140).

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit which is before this Court for review on writ of certiorari was entered on April 22, 1969 (A. 140). The petition for writ of certiorari was filed with this Court on June 13, 1969 (A. 5), and was granted on October 13, 1969 (A. 142) (38 U.S. Law Week 3127). The jurisdiction of this Court is conferred under the provisions of 28 U.S.C. §1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*), which are involved in this case are set forth below.

Section 8(a)

"It shall be an unfair labor practice for an employer—

* * *

"(5) to refuse to bargain collectively with the representatives of his employees . . . ."

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Section 10(c)

* * *

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . ."

QUESTION PRESENTED

The question presented is whether under the National Labor Relations Act the National Labor Relations Board has the power to order a party to agree to a substantive provision of a collective bargaining agreement.

STATEMENT OF THE CASE

The order of the United States Court of Appeals for the District of Columbia Circuit which is before this Court for review enforced, with one judge dissenting, a supplemental order of the National Labor Relations Board requiring the Petitioner to take the following affirmative action:

> "Grant to the Union a contract clause providing for the checkoff of union dues" (A. 137).

H. K. Porter Company, Inc., Disston Division — Danville Works (hereinafter referred to as the "Company" or "Petitioner") contends that the National Labor Relations Board (hereinafter referred to as the "Board") does not have the power under the National Labor Relations Act to order the Company to agree to such a contract clause or to any other substantive provision of a collective bargaining agreement.

This case initially arose from negotiations between the Company and the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Union") for a collective bargaining agreement at the Company's plant in Danville, Virginia (A. 46). These negotiations took place from October 23, 1963 to September 10, 1964 and consisted of twenty-one bargaining sessions in which the unresolved contract issues were reduced from fourteen to three, the three open issues being wages, insurance and a provision for the collection of union dues. (A. 46). During these bargaining sessions, the Union insisted that any contract between the parties had to contain a provision for the collection of union dues, and the Company refused to accede to the Union's demand (A. 47).

The Union filed an unfair labor practice charge which resulted in the issuance of a complaint accusing the Company of having bargained in bad faith "by, *inter alia*, adamantly rejecting the Union's proposal for a provision for the deduction of Union dues" (A. 11).

After a hearing, the Trial Examiner issued a decision in which he held that the Company had refused the Union's demand for a dues check-off provision for the purpose of frustrating an agreement with the Union and thus had engaged in bad faith bargaining in violations of Sections 8(a)(5) and (1) of the National Labor Relations Act* (A. 49-51).

The Trial Examiner's recommended order was that the Company cease and desist from refusing to bargain collectively with the Union and, affirmatively, that the Company bargain collectively with the Union.

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*As set forth in his decision, the Trial Examiner's bases for concluding that the Company's position with respect to a dues check-off provision was taken for the purpose of frustrating an agreement with the Union, were that the Company negotiator had an anti-union animus in a prior unfair labor practice proceeding and his "demeanor" as a witness in the present case showed that his attitude had not changed; that the Company negotiator's reason for refusing to agree to a dues check-off provision ("that he did not wish to give aid and comfort to the Union by assisting it in collecting dues") evidenced an attitude inconsistent with the Company's bargaining obligation under the National Labor Relations Act; and that the Company's reliance upon the relative economic strength of the parties in refusing to agree to a dues check-off provision ran counter to the objectives of the Act and demonstrated a purpose of forestalling agreement by disparaging the Union in the eyes of the employees (A. 49-51).

With regard to the effect of this recommended order, the Trial Examiner stated:

> "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled." (A. 51).

On July 9, 1965, the Board, without a separate opinion of its own on the merits, issued a decision and order adopting the Trial Examiner's findings, conclusions and recommended order (A. 55).

The Union then filed in the United States Court of Appeals for the District of Columbia Circuit a petition to review the Board's original decision and order. In its petition, the Union contended that the Board had erred in not ordering the Company to agree to a contract clause providing for the check-off of union dues (A. 64). The Company also filed a petition to review the Board's finding that the Company had bargained in bad faith (A. 1). The Board filed a cross-application for enforcement of its order (A. 1).

On May 19, 1966, the Court of Appeals (with a strong dissent by Senior Circuit Judge Miller*) affirmed

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*Judge Miller stated in his dissenting opinion that he had "seldom seen a record so barren of support for the decision of the examiner and the Board. . . ." (A. 78).

and enforced the Board's original decision and order* (A. 57). 363 F.2d 272 (D.C. Cir.), *cert. denied*, 385 U.S. 851 (1966).

Although, in affirming the Board's order, the Court rejected the Union's request that the Company be specifically ordered to agree to a dues check-off provision, the Court ruled that the Trial Examiner's comment in his decision (quoted at p. 6 *supra*), to the effect that his recommended bargaining order would require the Company to bargain in good faith but would not require it to agree to check-off, should be disregarded. On this point, the Court stated (A. 66-67):

> "This . . . is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off was 'for the purpose of frustrating agreement with the Union. . . .' To suggest that in further bargaining the company may refuse a check-off for some reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute."

The Company then filed a petition for a writ of certiorari to review this decision and order of the Court of Appeals. The petition, which was docketed at No. 392

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*In the opinion for the majority, Circuit Judge Wright noted that it was 85 miles from Danville to Roanoke where the Union had an office and "thus without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation"; and that the Company "had no general policy against a dues check-off" and its "refusal to check off union dues at the Danville plant was not based on inconvenience." (A. 61-62).

October Term, 1966, was denied by this Court on October 10, 1966 (A. 2).

The Company and the Union, in the ensuing contract negotiations, advocated divergent interpretations of the Board's original order as enforced by the Court of Appeals (A. 83-84). The Union contended that the order required the Company to grant a contract clause providing for the check-off of union dues (A. 88). The Company contended that while the order required it to bargain in good faith over dues collection, the order did not compel the Company to agree to a dues check-off provision (A. 89). Thereafter, the Company and the Union reached and executed a collective bargaining agreement dated December 1, 1966 which contained a provision reserving to the Union the right to request further bargaining on dues check-off, but no actual dues check-off provision was included in this collective bargaining agreement* (A. 85).

On February 28, 1967, the Union filed a motion for clarification of the order of the Court of Appeals dated May 19, 1966 (A. 2). In its motion, the Union requested the Court of Appeals to advise the parties that its order required the Company to agree to the Union's demand for a contract provision for the check-off of union dues (A. 87). On March 22, 1967, the Union's motion was denied by the Court of Appeals on the grounds "that there is in the record no concession from the company that the facts are as alleged by the union,

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*Although not part of the record in this case, it may be noted that the parties also entered into two subsequent collective bargaining agreements dated April 1, 1968 and May 1, 1969, the latter being for a term of three years.

and that under the circumstances a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the company's compliance with the decree." (Record, Court of Appeals Order dated March 22, 1967).

On April 3, 1967, the Union wrote to John A. Penello, Regional Director of Region 5, National Labor Relations Board, asking that a contempt action be initiated against the Company because the Company had not agreed to a dues check-off provision as the Union contended was required by the Board's original order (A. 109).

On June 22, 1967, Regional Director Penello wrote to counsel for the parties as follows:

> "The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed" (A. 111).

After the Board thus had found the Company to have bargained in good faith in compliance with its original order and had closed the case, the Union, on July 21, 1967, filed a motion asking the Court of Appeals to reconsider its denial of the Union's earlier motion for clarification (A. 101). The Company, of course, opposed this motion, as it had the Union's earlier motion (A. 112). On December 8, 1967, the Court of Appeals (still, without any evidence on the record or admissions by the Company to support the allegations in the Union's motions and without affording the parties the oportunity to brief or argue the substantive

legal issues involved) granted the Union's motion for clarification; simultaneously issued in Chambers (with Senior Circuit Judge Miller dissenting) a further opinion "with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining"; and remanded the case to the Board "for reconsideration in the light of this opinion" (A. 121).

On July 3, 1968, the Board, without further investigation or hearing, issued its supplemental decision and order affirmatively requiring the Company to "Grant to the Union a contract clause providing for the checkoff of union dues" (A. 137).

The Company filed a petition to review and set aside the supplemental order of the Board, and the Board cross-petitioned for enforcement of its supplemental order (A. 4). The Union intervened in those proceedings (A. 4). The Board's supplemental order was enforced by the Court of Appeals by an order entered on April 22, 1969 (A. 140).

The Company's petition for a writ of certiorari was filed on June 13, 1969 and was granted by this Court on October 13, 1969 (A. 142).

ARGUMENT

The present case brings to this Court the unique situation in which one party has been expressly *ordered to agree* to a contract provision demanded by the other party during collective bargaining negotiations. Specifically, the National Labor Relations Board has ordered the Company to:

> "Grant to the Union a contract clause providing for the checkoff of union dues." (A. 137).

The issue in this case is not whether the Respondent Union should or should not be granted a provision for dues check-off at the Company's Danville plant, but whether the Board, under the guise of remedying a finding of bad-faith bargaining in violation of Section 8(a)(5) of the National Labor Relations Act, can so involve itself in the collective bargaining process as to compel one party to grant a contract clause which the other party was not able to obtain at the bargaining table.

While the Court of Appeals, as stated in its clarifying opinion in this case, believes that "the requirement that a checkoff be granted is at most a minor intrusion on freedom of contract" (A. 128), if the Board can order the Company to agree to this contract clause, there is nothing to prevent it from ordering either an employer or a union to agree to contract provisions concerning wage rates, fringe benefits and other terms and conditions. To permit such a remedy for bad-faith bargaining would be to destroy the very foundation of the collective bargaining process, namely, freedom of contract.

Argument.

The Company contends that the Board does not have the power under the National Labor Relations Act to order either party to agree to a substantive provision of a collective bargaining agreement. The Congress, while creating a governmental power to assure the right of collective bargaining, precisely proscribed in Section 8(d) of the Act a specific limitation on that power so as also to assure freedom of contract.

Section 8(d) of the National Labor Relations Act provides:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . ." (Emphasis added) 29 U.S.C. § 158(d).

The Board is empowered by Section 10(c) of the Act to formulate orders to remedy the commission of unfair labor practices, but Section 10(c) expressly provides that the Board's remedial orders must be such "as will effectuate the policies of this Act." 29 U.S.C. §160(c). The policy of freedom of contract is clearly and expressly set forth in Section 8(d) of the Act and thus, by the terms of Section 10(c), constitutes a direct limitation on the Board's remedial powers. The Board's

supplemental order in this case, in ordering the Company to "grant to the Union a contract clause providing for the checkoff of union dues", is in clear derogation and violation of this policy of freedom of contract and, therefore, beyond the Board's remedial powers.

This Court has consistently recognized this fundamental policy of freedom of contract by stating on several occasions that the National Labor Relations Act cannot be utilized, even by indirection, to compel a party to agree to a substantive provision of a collective bargaining agreement.

Even prior to the enactment of Section 8(d), this Court stated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937):

> "*The Act does not compel agreement between employers and employees.* It does not compel any agreement whatever . . . The Theory of the Act is that free opportunity for negotiation with accredited representatives of employees *is likely* to promote industrial peace and *may* bring about the *adjustments and agreements which the Act in itself does not attempt to compel.*" (Emphasis added).

Similarly, this Court, subsequent to the enactment of Section 8(d), said in *NLRB v. American National Ins. Co.*, 343 U.S. 395, 404 (1952):

> "And it is equally clear that the *Board may not,* either directly or indirectly, *compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Emphasis added).

The present supplemental order of the Board represents the precise evil which the Congress intended to

obviate when it enacted Section 8(d). As Mr. Justice Brennan, reviewing the legislative history of Section 8(d), said in *NLRB v Insurance Agent's International Union*, 361 U.S. 477, 486-487 (1960):

> "Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the 'good-faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. *Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make* and of the proposals and counterproposals that he may or may not make.' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 19. *Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining in to §8(d) of the Act. . . .*
>
> "The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. . . . *But it remains clear that §8(d) was an attempt by Congress to prevent the Board from controlling*

the settling of the terms of collective bargaining agreements." (Emphasis added).

Until the issuance of its present supplemental order, the Board itself recognized that it did not have authority under the National Labor Relations Act to order the Company to agree to a dues check-off provision. For example, at page 7 of its brief to this Court in opposition to the Company's first petition for certiorari (No. 392 October Term, 1966), the Board stated:

> ". . . [Its original] order in this case did not violate the provision of Section 8(d) of the Act that the statutory duty to bargain collectively 'does not compel either party to agree to a proposal or require the making of a concession * * *.' The Board's order merely directs the Company to bargain with the Union. The Board rejected the Union's request to include a provision 'requiring the company to withdraw its objection to the dues check-off,' . . . and the court of appeals upheld that ruling. . . ."

This is not the only case in which the Board has acknowledged that it does not have statutory authority to compel a party to agree to a substantive provision of a collective bargaining agreement. In *NLRB v. Triangle Plastics, Inc.*, 166 NLRB No. 86 (1967), *enforced*, 406 F.2d 1100 (6th Cir. 1969), the trial examiner and the Board denied the union's request for an order requiring the employer to pay monetary benefits which the employees would have received if the employer had bargained in good faith. Although the Board chose not to "pass" on his rationale, the trial examiner stated (1967

CCH NLRB at p. 28,288) that if the relief requested by the union were granted,

> ". . .[T]he Board, in effect, would be fixing terms and conditions of employment retroactively which, I believe, is beyond its statutory authority. The Supreme Court has cautioned the Board that it 'may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.'" [citing *NLRB v. American National Ins. Co.*, 343 U.S. 395, 404].

Similarly, in *United Aircraft Corp.*, 168 NLRB No. 66 (1967), *enforcement denied on other grounds, sub. nom. Machinists v. NLRB,* .... F.2d ...., 60 CCH LC ¶10,118 (D.C. Cir. 1969), involving a Section 8(a)(5) violation, the Board concurred in the trial examiner's rejection of a request by the General Counsel and the union for an order compelling the employer to agree to dues check-off and other contractual provisions. In *Intercity Petroleum Marketers, Inc.*, 173 NLRB No. 222 (1968), the Board rejected the portion of the trial examiner's recommended order for a violation of Section 8(a)(5) which would have required the employer to sign an agreement containing a union security clause ". . . since this would require the Board to write a union security clause on which the parties never agreed" (1968-2 CCH NLRB at p. 25,711).

The courts of appeals for several circuits have also recognized that the basic policy of freedom of contract, as expressed in Section 8(d) of the Act, prohibits the Board from directly or indirectly compelling a party to agree to a substantive provision of a collective bargain-

ing agreement. *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 690 (2d cir. 1967); *NLRB v. American Aggregate Co.*, 335 F.2d 253, 254-255 (5th Cir. 1964); *NLRB v. Lewin-Mathes Co.*, 285 F.2d 329, 332-333 (7th Cir. 1960); *NLRB v. United Clay Mines Corp.*, 219 F.2d 120, 124-126 (6th Cir. 1955).

In fact, the Board's supplemental order in the present case is even in conflict with a prior decision of the same Court of Appeals which enforced the Board's supplemental order. In *Retail Clerks International Association v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967), a Section 8(a)(5) case, the Court of Appeals for the District of Columbia Circuit refused to enforce a portion of the Board's order which compelled an employer to execute a contract for certain of the employer's stores because, the Court concluded, there was inadequate support in the record for a finding that the employer and the union had reached an agreement with regard to those stores. In reaching this decision the Court specifically relied on Section 8(d) of the Act. Senior Circuit Judge Edgerton, speaking for the Court, stated on this point (373 F.2d at 660):

> "On the record before us we think *the Board's order with regard to the twenty-five locations is at odds with § 8 (d) of the Act* . . . . As the Supreme Court has said: '[Section 8(d)] contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession. * * * And it is equally clear that the Board may not, either directly or indirectly, compel concession or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' [Citing *NLRB*

v. American National Ins. Co., 343 U.S. 395, 404.] Though the Board may properly order execution of a contract to which the parties have agreed, it may not order execution of a contract to which it thinks they should have agreed." (Emphasis added).

While this Court, many circuit courts, and the Board have recognized that Section 8(d) of the Act precludes the Board from ordering a party to agree to a substantive provision of a labor contract, the Court of Appeals in its clarifying opinion in this case stated its interpretation to be that Section 8(d) merely ". . . relates to the determination of *whether* a Section 8(a)(5) violation has occurred and not to the *scope* of the remedy . . . ."* (A. 122). Petitioner respectfully submits that this is, at most, a literal interpretation of Section 8(d) and ignores the obvious policy of the Act as the Congress intended it. As pointed out previously, this Court, in *NLRB v. Insurance Agents' International Union*, 361 U. S. 477, 486-87 (1960), clearly recognized that the intent of the Congress in enacting Section 8(d) was to prevent the Board from "setting itself up as the judge of what concessions an employer must make,"

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*Actually, the Court of Appeals in its first opinion in this case (in which it enforced the Board's original order, requiring the Company to bargain in good faith, and rejected the Union's request for an order compelling the Company to agree to a dues check-off provision) recognized that Section 8(d) of the Act precludes the Board from ordering a party to agree to a substantive provision of a collective bargaining agreement. The Court of Appeals stated in this regard (A. 65):

> "It is true, as the company contends, that under Section 8(d) it cannot be compelled to agree to a proposal or make a concession."

and from "controlling the settling of the terms of collective bargaining agreements." It is simply illogical to conclude from these clear expressions of Congressional intent that the Board *may not* predicate a finding of bad-faith bargaining solely on a party's refusal to agree to a particular contract provision, yet *may* order that party to agree to the very same contract provision once bad-faith bargaining has been found from other evidence. The prohibition of the former would be meaningless if the Board were permitted to do the latter, since the very reason for this express prohibition in Section 8(d) was to prevent the Board from "controlling the settling of the terms of collective bargaining agreements." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486-487 (1960).

The Court of Appeals, in attempting to rationalize the view expressed in its clarifying opinion in this case that Section 8(d) does not prohibit the Board from ordering a party to agree to a contract provision, recognized the fundamental Congressional intent and policy that the Board is not to interfere in any manner with the settling of the terms of collective bargaining agreements. The Court of Appeals stated in this regard (A. 124):

> "We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract — albeit collective contract. The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board."*

*As authority, the Court of Appeals cited *NLRB v. American National Ins. Co.*, 343 U.S. 395 (1952) and *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

Nevertheless, while noting that Board orders which impinge on the principle of freedom of contract "are not to be casually undertaken," the Court of Appeals concluded that such orders must be made available to the Board where necessary to assure the workers' right to bargain collectively (A. 124). Thus, the Court stated (A. 126-127):

> "Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively."

Certainly, a fundamental principle of the Act is to assure the workers' rights to bargain collectively. It is also true, as this Court has recognized,* that *in determining whether a party has in fact bargained in good faith* there can be "tension" between the principle that a party must bargain in good faith and the principle that the party is not required to agree. However, any such "tension" is necessarily removed by a finding that the party has bargained in bad faith. Thereafter, in fashioning a remedy there need not, and should not, be any tension (much less, conflict) between these two fundamental principles of the Act. A bargaining order, properly enforced through contempt proceedings, if necessary, will assure the workers' rights to bargain collectively, and will do so without conflicting with the principle of freedom of contract.

**NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486-487 (1960).

The failure of the Court of Appeals to recognize the consistency between these two principles is due largely to the Court's apparent concern that unless the Union obtained a dues check-off provision it would not be able to survive at the Danville plant* and the employees would lose their means of collective bargaining, which the Court apparently equated with their "right" of collective bargaining. Thus, supposedly to assure the employees' right to bargain collectively, the Court concluded that the Company could be ordered to agree to a dues check-off provision. However laudable this motive, it assumes that the loss of this particular Union would be equivalent to the loss of the workers' right to bargain collectively. This simply is not true. The Act does not purport to make the workers' right to bargain collectively dependent upon the existence of any particular union.**

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*In this regard, the Court noted that a dues check-off provision "which is included in 92 per cent of all manufacturing industries labor contracts—is likely to be of life or death import to the fledgling union, while it is of no consequence whatever to the employer. Yet if the Board can do no more than repeatedly order the company to bargain in good faith, the workers' rights to bargain collectively may be nullified." (A. 129)

**With regard to the original Act, Senator Wagner stated during the Senate debates on his bill: "It does not favor any particular union." 79 Congressional Record at 2371. In *May Stores Co. v. NLRB,* 326 U.S. 376, 398 (1945), Mr. Justice Rutledge stated: "Nothing in the Act requires an employer to maintain a union's prestige. . . " Former Solicitor General Archibald Cox has commented that the Taft-Hartley Amendments to the Act ". . . are rooted in the view that union and employees are not one." Cox, "The Labor Management Relations Act," 61 Harv. L. Rev. 1, 47 (1947).

Argument.

In its clarifying opinion, the Court of Appeals concluded that an order compelling agreement "may be the only effective remedy" where an employer "has twice been found to have violated his duty to bargain in good faith" (A. 129-130). It is highly questionable whether an order to agree to a *specific contract provision* could ever effectively remedy a violation predicated (as found in this case) on an *overall purpose* "to forestall reaching an agreement with the Union." (A. 50)* More significant from a legal standpoint, however, is the fact that the order requiring the Company to "grant to the Union a contract clause providing for the checkoff of union dues" is a punitive order. While the Board is given the power under Section 10(c) of the Act to frame such remedial orders "as will effectuate the policies of this Act," this Court has held that the Act does not authorize the Board to take punitive measures against employers. *Local 60, Carpenters v NLRB,* 365 U.S. 651 (1961); *Phelps Dodge Corp. v NLRB,* 313 U.S. 177 (1941); *Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940).

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*On this point, the Board's Regional Director concluded that the Board's original order which required the Company to bargain in good faith did effectively remedy the overall bad-faith bargaining which had been found to exist. In the contract negotiations which followed the entry of the original bargaining order and its enforcement by the Court of Appeals, the Company expressed its willingness to the Union to bargain over a dues collection provision. However, the Union insisted that the Board's order, as enforced, required the Company to grant a check-off provision without any further bargaining. Subsequently, the Board's Regional Director concluded that the Company had "satisfactorily complied" with the Board's original order and he thereupon "closed" the case.

Argument.

In *Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961), this Court, in an opinion by Mr. Justice Douglas, stated:

> "But the power of the Board 'to command affirmative action *is remedial, not punitive*, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation when those consequences are of a kind to thwart the purposes of the Act.' *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236." (Emphasis added).

In the same case, Mr. Justice Harlan, in a concurring opinion in which Mr. Justice Stewart joined, stated (p. 657):

> "The Board has been told that it is without power to 'effectuate the policies of this Act' *by assessing punishments upon those who commit unfair labor practices*. . . . The primary purpose of the provision for other affirmative relief has been held to be to enable the Board to take measures designed *to recreate the conditions and relationships that would have been had there been no unfair labor practice.*" (Emphasis added).

Similarly, many courts of appeals have held that affirmative orders which command employer action in excess of that required to restore the circumstances which would have existed if no unfair labor practice had been committed, are punitive and unenforceable. *Kroger Co. v. NLRB*, 401 F.2d 682 (6th Cir. 1968); *Local 57, Garment Workers v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967); *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

Argument.

The Board's order requiring the Company to "grant to the Union" a dues check-off provision is punitive, rather than remedial, and thus contrary to the Act, in that the order does not serve to restore the *status quo* since it gives to the Union the benefit of a contract provision which never previously existed between the parties.

Apparently, the Court of Appeals does not believe that a party can meet its obligation to bargain in good faith by *merely* bargaining in good faith. For example, after noting that the Board's Regional Director had concluded that the Company had bargained in good faith subsequent to the Board's original bargaining order and had, therefore, "closed" the case, the Court of Appeals in its clarifying opinion stated:

> ". . .[T]he Board had apparently accepted the company's interpretation of the decree *as requiring only that it now bargain with the union* as to some form of dues collection. . . ." (A. 119-120).
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> * * *
>
> "We did not think that under the Board order the company could now purge itself of its bad faith and meet its Section 8(d) obligations *by agreeing simply to negotiate* on alternatives to a checkoff. Apparently we misread the Board's order, for the *Board is apparently satisfied that the employer has complied with its duty to bargain in good faith by agreeing to such negotiations.*" (A. 120). (Emphasis added).

Thus, the Court of Appeals apparently believes that the Company must do more than just bargain in good faith in order to satisfy its bargaining obligation. In-

stead, the Court of Appeals apparently has mistakenly equated the Company's obligation to bargain with an obligation to agree to the Union's demand for a dues check-off provision.* The fallacy of this type of reasoning was noted by Mr. Chief Justice Burger in his dissenting opinion in *United Steelworkers of America v. NLRB*, 390 F.2d 846, 855 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968):

> "It may be tempting to suggest that a corollary of the duty to bargain to reach an overall agreement is a duty to bargain with the object of reaching an agreement on each item proposed. But this has never been held to be the law by any court and it is inconsistent with the §8(d) provision that neither party need yield on a point."

The Court of Appeals also attempts to justify the order requiring the Company to agree to a dues check-off provision on the grounds that since it was found that the Company "had no business reason for refusing the check-off," the Company cannot thereafter maintain any legally justifiable reason for any further de-

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*This is not surprising in view of the almost total preoccupation of the Trial Examiner and the Court of Appeals with the subject of check-off in determining that the Company had bargained in bad faith, rather than the "entire conduct of the respondent, particularly its conduct at the bargaining table" on which the Board and the Courts should rely in deciding whether or not a party has bargained in good faith. See Separate Opinion of Mr. Justice Frankfurter in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 508 (1960).

nial of a dues check-off provision.* If the Board's supplemental order in this case is allowed to stand, the "new bargaining device" envisioned by Mr. Chief Justice Burger in his dissenting opinion in *United Steelworkers of America v. NLRB*, 390 F.2d 846 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968), will have come to pass:

> "The parties may now reach an over-all contract incorporating those provisions they agree on and excluding those they do not, after the usual 'horse' trading processes of bargaining, then one party can come to the Board and claim that the refusal to agree to some provision which was not included was an unfair labor practice because the recalcitrant party lacked a sufficient business or union reason." 390 F.2d 846, 858.

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*As to whether a "business" reason has to be given for refusing a bargaining demand, Mr. Chief Justice Burger commented in his dissenting opinion in *United Steelworkers of America v. NLRB*, 390 F.2d 846, 855-856 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968):

> "No authority is cited for the proposition that failure to give 'business' reasons for rejection of a demand is itself an unfair labor practice. Would there not be 'legitimate reason of self-interest' in withholding approval of dues check-off until some year's bargaining when the Company had little else to offer?
>
> * * *
>
> "Although apparently no case has held explicitly that a bargainer may legally refuse a demand without giving some 'business' reason, there is authority implying that he may lawfully do so." [Citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958)].

Conclusion.

This immersion of the Board into the collective bargaining process becomes complete when the Board, as it did in the present case, weighs the reasonableness of the parties' positions, gauges the extent to which an order to agree would intrude on freedom of contract and orders the recalcitrant party to agree to the particular contract provision. This, of course, is exactly what the Congress has prohibited the Board from doing by the provision in Section 8(d) of the Act that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession. . . ."

CONCLUSION

The Board, being an agency created by our national labor laws, cannot exceed the legislative intent of its creation as it attempts to do, with the sanction of the Court of Appeals, in this case. Rather than giving full expression to the Congressional purposes and policies contained in Section 8(d) of the National Labor Relations Act, the Board and the Court of Appeals seek to circumvent and avoid those clear and succinct purposes and policies by directly and patently compelling the Company to agree to a substantive provision of a collective bargaining agreement.

While the Court of Appeals places heavy emphasis on the need to assure the workers' rights to bargain collectively, there can be no greater danger to those rights than an order which requires a party to agree to a substantive provision of a collective bargaining agreement. For, if the Court of Appeals' decision is allowed to stand as part of our federal labor law, such law will be just as applicable to unions as to employers.

Thus, while the Board's present order is in direct conflict with the fundamental policy of freedom of contract as expressed in Section 8(d) of the Act, it also lays the foundation for the erosion of the workers' rights to bargain collectively. There could be no true or free collective bargaining if the Board had the power to order either bargaining party to agree to a contract demand made by the other party. Wisely and expressly the Congress has withheld from the Board the power to issue the order which is now before this Court for review.

For the foregoing reasons, Petitioner respectfully requests that the order of the United States Court of Appeals for the District of Columbia Circuit be reversed.

Respectfully submitted,

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